United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

74-1036

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

CITY TRUST COMPANY, Executor
of the Will of
FREDERICK A. LOCKWOOD, Deceased,

Plaintiff-Appellee

v.

UNITED STATES OF AMERICA,

Defendant-Appellant

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

PETITION FOR REHEARING

LOUIS CICCARELLO,
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For Appellee

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74-1036

CITY TRUST COMPANY, Executor
of the will of Frederick A.
Lockwood, Deceased,

Plaintiff-Appellee

v.

UNITED STATES OF AMERICA,

Defendant-Appellant

PETITION FOR REHEARING

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, the plaintiff respectfully petitions for a rehearing on the ground that this Court has misconstrued the approach and tenor of Connecticut law and its application to this case. An examination of Connecticut law reveals that it is indisputable that the Connecticut courts will enforce any limitation or restriction upon a trustee's power of invasion and will diligently

seek to find such limitation or restriction, especially where a charitable trust is involved. Hull v. Holloway, 58 Conn. 210 20 Atl. 445 (1889); Bishop v. Groton Savings Bank, 96 Conn. 325, 114 Atl. 88 (1921); Hartford Connecticut Trust Co. v. Eaton, 36 F. 2d 782 (C.A. 2 1972); Hooker v. Goodwin, 91 Conn. 463, 99 Atl. 1059 (1917); Ministers Benefit Board v. Meriden Trust Co., 139 Conn. 435, 448, 94 A2d 917 (1953); Gimbel v. Gimbel Foundation, Inc., Conn. Law Journal Vol. 35, Feb. 1974. The plaintiff contends that, although the Connecticut courts would find the language of the Lockwood will ambiguous, they would none the less find it restrictive in accordance with this general principle.

This principle, and the conscious effort on the part of the Connecticut courts to limit and restrict powers of invasion for the benefit of remaindermen, are clearly demonstrated in a series of cases dealing with split-interest trusts, all of which are in addition to the ones cited in plaintiff's brief.

In Hull v. Holloway, supra, a testamentary trust for the benefit of the testatrix's husband directed the trustee to pay "so much of the income and principal of the above named property as my said husband may require for his own personal use, the same to be paid, transferred and conveyed to my said husband upon his written

request." The husband contended that pursuant to this provision the trustee was obligated to pay over the trust estate to him upon his written request. The Court, however, obviously disturbed, if not shocked, by the thought that the husband could, "by a single stroke of the pen, take possession of the entire trust estate, convert the same to his individual use, and excluding all other beneficiaries under the will, terminate the trust," rejected such contention and construed the word "require" to mean "to need" or "to be requisite", and held that the provision permitted the trustee to make payments to the husband only in the event of his need.

Similarly, in Bishop v. Groton Savings Bank, supra, where the testator gave his wife a legal life estate in the residue of his estate with "authority to use as much of the Principal of My Estate, both Real and Personal as she may desire for her own personal comfort", the Court held that she could use the principal of the estate only for her personal support and had no power to make a gift of any part of such principal. To much the same effect is Little v. Geer, 69 Conn. 411, 37 Atl. 1056 (1897), where the testator gave his wife the

> "privilege of using as much of the principal as she may desire for her comfort and maintenance with full power and authority to sell and legally convey any of my estate both real and personal as she may see fit, and to freely use the avails thereof as long as she remains my widow".

The Court observed that the testator had also remembered his children and grandchildren, had intended that they should take something from his estate, and evidently had expected there would be something left after his widow's death or remarriage. It held, therefore, that her use of principal would be limited to what might be required "for her comfortable and proper maintenance and support".

In Frey v. Greenberg, 151 Conn. 663, 202 A2d 142 (1964), the will provided that if the income from the trust funds "shall in any year be insufficient, by reason of serious illness or unforeseen emergency of any nature, to provide for the reasonable needs of the beneficiary of such Fund, I direct that my ..... Trustee may, in his discretion use for the purpose of meeting such unusual needs such part or all of the principal of each Fund (for its beneficiary) as he shall deem proper." Despite the breadth of the language utilized, the Court stated that the principal may be invaded only in case of need, and only after the private income of the beneficiary was exhausted.

The case of Connecticut Bank & Trust Co. v. Lyman, 138 Conn. 273, 170 A2d 130 (1961),upon which the government and this Court rely, is not inconsistent with the aforementioned cases or the general principal enunciated above. That case holds that where

the language of the instrument unequivocally provides for an unlimited power of invasion, the Connecticut courts will enforce it. However, the Connecticut Supreme Court in that case was quick to express the long established principle that: "And even though an extremely liberal power of invasion of principal is given to, or for the benefit of, an income beneficiary, if any purposes of, standards for, or limitations on, the exercises of that power are expressed, we have required their enforcement and have refused to permit an untrammelled invasion of principal where discretion was involved". Connecticut Bank & Trust Co. v. Lyman, supra, p. 278. Accordingly, Lyman must, by its own facts, be limited to those exceptional cases where a clear and unequivocal power of invasion is granted.

No case has been found, after careful re-examination of all the authorities, where the Connecticut courts have failed to discover a limitation or restriction on the power of invasion where the language providing for invasion was ambiguous or subject to interpretation. In fact, the Connecticut courts have not only evinced a strong policy to limit the power of invasion wherever and whenever possible, but to also apply an even stricter standard where a charitable trust is involved.

Ministers Benefit Board v. Meriden Trust Co., supra, p. 448; Gimbel v. Gimbel Foundation, Inc., supra.

In view of these clear policies, the Connecticut courts, in construing the Lockwood will, would no doubt uphold the decision of the District Court that the language used was in fact restrictive. The courts could easily fasten on to the word "necessary" in the basic grant of power, in the same fashion as demonstrated in the cases cited above. They also could find the following sentence as explaining the testator's view of his widow's station in life. Thus finding the language ambiguous, but none the less susceptible to a restrictive interpretation, the Connecticut courts would maintain its policies and restrict invasion to the widow's accustomed standard of living.

The District Court properly applied the principle and policies ennunciated by the Connecticut courts. That court construed the key phrase, "at least $500.00 a month ..... for her own personal spending money and for whatever she may desire", as providing the widow with a monthly amount commensurate with the disposable income necessary to maintain her life style. The phrase "for whatever she may desire" was

viewed not as an invitation to extravagance, but simply as a modification to "personal spending money," indicating that the trustee was not to interfere with the manner in which such money was spent by the widow. The will speaks of a monthly or budgetary amount and only of items, such as occupation of a home, spending money and necessary expenses, which comprise the ordinary elements of a life style. Accordingly, the District Court's interpretation, especially in view of the cases and principles cited, is reasonable and proper.

In view of the District Courts proper application of well established principles of Connecticut law, its decision should have been affirmed. The Lyman case does not, and cannot, provide a proper foundation for a judgment in this case. It is a unique case in the Connecticut law of trusts, and its holding should be limited to cases of unequivocal language granting an untrammelled power of invasion. This is clearly not such a case. The plaintiff respectfully petitions this Court to re-examine the Lyman case, and the cases cited herein, to determine whether Connecticut law was properly applied in this case, and upon such re-examination, to reaffirm the decision of the District Court.

Under Rule 40 of the Federal Rules of Appellate Procedure, this Court can request an answer from the government to this petition. We challenge the government to discover any Connecticut case which refutes the general principle of law which we assert, namely that the Connecticut courts will enforce any restriction or limitation upon a power of invasion and will diligently search for such limitation or restriction, especially where a charitable trust is involved. We submit that the Lyman rule is clearly an exception to this general principle, and the Lockwood will provides an ascertainable standard when viewed in accordance with this principle.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that service of this petition has been made on opposing counsel in accordance with the rules.

LOUIS CICCARELLO,
Attorney